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DIRECTOR OF PERSONNEL

Thursday, May 24, 2018

Christina Carroll
2540 Severn Ave. Suite 400
Metairie, LA 70002

Re: **Steven Achord, et al VS.**
Department of Fire
Docket Number: 8593, 8602-8628, 8630-8643, & 8646-8648, 8655

Dear Ms. Carroll:

Attached is the decision of the City Civil Service Commission in the matter of your appeal.

This is to notify you that, in accordance with the rules of the Court of Appeal, Fourth Circuit, State of Louisiana, the decision for the above captioned matter is this date - 5/24/2018 - filed in the Office of the Civil Service Commission at 1340 Poydras St. Suite 900, Orleans Tower, New Orleans, Louisiana.

If you choose to appeal this decision, such appeal must conform to the deadlines established by the Commission's Rules and Article X, 12(B) of the Louisiana Constitution. Further, any such appeal shall be taken in accordance with Article 2121 et. seq. of the Louisiana Code of Civil Procedure.

For the Commission,

Doddie K. Smith
Chief, Management Services Division

cc: Timothy Mc Connell
Elizabeth S. Robins
Jay Ginsberg
Steven Achord
1604 Airline Park Blvd. Metairie LA 70003
file

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

STEVEN ACHORD, ET AL., vs. DEPARTMENT OF FIRE	DOCKET Nos.: 8610, 8642, 8614, 8613, 8609, 8641, 8615, 8648, 8616, 8646, 8643, 8617, 8602, 8618, 8603, 8619, 8620, 8621, 8606, 8622, 8608, 8640, 8612, 8623, 8611, 8624, 8625, 8626, 8605, 8627, 8628, 8593, 8607, 8630, 8631, 8632, 8633, 8634, 8635, 8636, 8637, 8638, 8639, 8647, 8604, 8655

INVESTIGATORY FINDINGS & ORDER

This matter originally came before the Commission on December 18, 2017 through the Appointing Authority's self-styled "Notice of Appeal." In its notice, the Appointing Authority asked the Commission to review the Personnel Director's decision in the above-referenced matter. In a January 8, 2018 Order, the Commission chose to exercise its constitutional authority to investigate alleged violations of Article X of the Louisiana State Constitution and its own Rules. This was not an exercise of its appellate jurisdiction.

After careful consideration of arguments presented by the Parties, evidence and testimony gathered by the hearing examiner, and the decision issued by the Personnel Director, the Commission renders the following investigatory findings and Order. Chairperson Michelle Craig has prepared the majority opinion and is joined by Commissioners Stephen Caputo. Commissioner Tania Tetlow concurs and assigns reasons. The majority has concluded that the Fire Department for the City of New Orleans has applied the Commission's Rules in an unconstitutional manner. Vice-Chairperson Ronald McClain concurs with the majority's statement of historical context and remedy but dissents from the majority's analysis and conclusion and assigns reasons. Commissioner Clifton Moore concurs with the majority's historical context and conclusion, but dissents from the majority's remedy and analysis and assigns reasons.

I. Introduction

What the Commission set out to do in 2014 was provide appointing authorities with more discretion while keeping intact a merit-based system of appointment and promotion that protected both residents and employees from favoritism and political patronage. The result was a series of rule amendments known as the "Great Place to Work Initiative" (hereinafter "GPTWI"). The underlying challenges to the 2016 Fire Captain promotions present the first opportunity for the Commission to examine, in great detail, how an appointing authority applied the added degree of discretion provided for by the GPTWI rule amendments.

On one side of the dispute, the New Orleans Fire Department (hereinafter "NOFD") asserted that it complied with the Commission's rules and that the only requirements in place for appointments and promotions were that a candidate; 1) possessed the requisite minimum qualifications, and 2) passed the applicable examination.

A group of Firefighters and Fire Operators (hereinafter "Firefighters") brought a total of forty-six challenges to NOFD's promotion of forty-one Fire Captains in 2016. The Firefighters alleged that NOFD did not make the promotions pursuant to a "general system based upon merit, efficiency, fitness, and length of service" as ascertained by a competitive examination in violation of Article X, Section 7 of the Louisiana Constitution.

The Commission believes that the only way to fully address the challenges before it is to conduct a detailed analysis and review of the following:

1. The role of the Commission in the appointment and promotion of applicants to positions within the City's classified service in the context of Article X of the Louisiana Constitution;
2. The arguments, presentations and representations made to the Commission in the Summer of 2014 that led to the adoption of the GPTWI rule amendments; and
3. NOFD's implementation of the GPTWI and application of those rules to the 2016 Fire Captain promotions.

It is only after a full review of each of these elements, that the Commission is able to reach a definitive response to the challenges before it and provide vital guidance to the Civil Service Department (hereinafter "Civil Service" or "the Department") and appointing authorities.

A. Jurisdiction

In adopting the rule changes that underlie the instant dispute, the Commission did not (and could not) cede its responsibility to "investigate violations of [Article X of the Louisiana State Constitution] and the rules, statutes, or ordinances adopted pursuant hereto." La. Con. art. X, § 10(B). This mandate is unrestricted and provides the Commission with the power and authority to review any investigation into alleged violations of its Rules or Article X of the Louisiana Constitution.

The Commission notes that Article X provides that each commission "may" initiate investigations. Thus, the Commission had discretion in exercising its authority. In the matter now before us, the Personnel Director issued an explicit finding that NOFD applied Civil Service Rules in an unconstitutional manner. Such a finding may have wide-ranging implications to promotions and appointments across the City's Civil Service System. As a result, the Commission chose to exercise its investigatory authority in this circumstance.

At the Commission's February 2018 meeting, NOFD argued that the Commission's jurisdiction is limited to procedural challenges. Such a position stands in stark contrast to the mandate of Article X. The flaw in NOFD's position can be demonstrated with the following hypothetical: If the director of an appointing authority conducted a survey of all employees on a promotional list to determine who each employee voted for in the 2016 Presidential election and then only promoted those who voted for one particular candidate, an employee would have a constitutional right to challenge such an action as politically-motivated discrimination. Yet, if the

Commission were to adopt NOFD's position, the Commission's inquiry would begin and end with a single question: Were the individuals promoted on the list of employees eligible for promotion? Such a restrictive view of the Commission's jurisdiction is untenable given the Commission's constitutional mandate to address what would otherwise appear to be a pretty straightforward prima facie case of discrimination based upon political views.

II. Brief History of Article X and Promotional Rules

A. Early Iterations of Constitutional Provisions

The Louisiana Constitution of 1921 contained a very brief Article that covered the civil service system within cities:

> The Legislature shall provide for civil service in municipalities having a population of one hundred thousand (100,000) or more, and for the recognition and adoption of the merit system in the employment or appointment of all applicants; and shall provide against the discharge of employees' or appointees without good and sufficient cause.

La. Con. art. XIV, § 15 (Constitution of 1921).

In 1940, the Legislature adopted a series of statutes that covered both state and municipal civil service systems. The Louisiana Law Review provided a summary as to the basic principles of certification under those statutes:

> The position does not go necessarily to the person showing best qualifications. **Three names shall be submitted for each position; the employing official may take his choice**. Appointments are probationary; the employee must establish his fitness on the job. He is entitled to a sixty-day trial, unless the Director of Personnel assents to his discharge after a shorter period. If he is kept for six months, the appointment is complete. If a probationary appointee is dismissed, the employing official must again return to the certification list for the top three candidates. **To prevent abuse of this system, the official may not reject more than three persons for a particular position**.

Louisiana Law Review, Vol. 3, No. 1 at 20 (1940)(emphasis added).

Then, in 1948, under the administration of Earl Long, the Louisiana Legislature largely

denuded the civil service system. This attempt to return to the spoils system of state and municipal employment led to the adoption of several new amendments that enshrined state and city civil service systems in the constitution. The Louisiana Constitution of 1955 was the first occasion where one can find detailed constitutional articles regarding the Civil Service System. One of those amendments covered the certification of eligible applicants for appointment and promotion:

> The State and City Civil Service Commissions shall adopt … rules providing for the method of certification of eligibles for appointment or promotion, **the number to be certified, which shall be not less than three except if more than one vacancy is to be filled the name of one additional eligible for each additional vacancy may be certified**….

La. Con. art. 14, § 15(I)(a), (1955 Cumulative Pocket Supplement at p. 297)(emphasis added).

B. Constitutional Convention of 1973

During the Louisiana Constitutional Convention of 1973, delegates passionately debated the constitutional articles covering civil service. (Records of the Louisiana Constitutional Convention of 1973: Verbatim Convention Transcripts, Vol. IX at pp. 2594-2768). Delegate Moise Dennery – who spent ten years on the State Civil Service Commission, six of those years as the chairman – often fielded questions from other delegates regarding proposed amendments. One of those questions came from Delegate Mack Abraham:

> Q: On page 5 where you say that the number to be certified shall be not less than three, as I.... if I interpret this correctly, **does not prevent the commission, in adopting its rules, or setting up its rules, to certify more than three if it so desires, would it**?
>
> A: (By Dennery) That's quite correct. That's the law right now.

Id. at p. 2639 (emphasis added).

Mr. Dennery reinforced this position when he rose in opposition of an amendment that would have increased the minimum number of certified candidates to five:

> Mr. Chairman and delegates, I would only point one thing out to you, and that is that the provision that is sought to be amended provides that the list shall contain

> not less than three names. **It does not mean that, in the event it's necessary to increase that number, that a commission could not so increase it. Thus far, in the history of civil service in Louisiana, and the rule has always been a rule of not less than three, to my knowledge the commission has never increased it. But I do not believe that the increase is required. It seems to me if it is required, any commission will certainly recognize this and thereby increase it.** Furthermore, if there are more than.... if there is more than one position to be filled, the list is increased so that it's three or four or five, as the case may be. What this amendment seeks to do, is to say that in every Instance, at least five names must be certified to the appointing authority. As was so ably pointed out by Mr. Jenkins, this allows for more—not less—political influence. It provides for less merit rather than more merit. This is a merit system of public employment that we are trying to adopt here. I, therefore, urge you to defeat this amendment.

Id. at p. 2690 (emphasis added). Throughout his statement, Mr. Dennery uses permissive rather than mandatory language and noted that commissions had the authority to increase the minimum number of eligible applicants. Though he cautioned other delegates about risks inherent when contemplating such an increase, Mr. Dennery clearly believed that a Civil Service Commission could increase the number of eligible candidates certified if it saw the need to do so.

Ultimately, when compared to the version adopted through the 1973 Constitutional Convention, there is very little difference between it and the language from 1955:

> Permanent appointments and promotions in the classified state and city services shall be made only after certification by the appropriation department of civil service under a general system based upon merit, efficiency, fitness, length of service, as ascertained by examination, which, so far as practical, shall be competitive. **The number to be certified shall not be less than three; however, if more than one vacancy is to be filled, the name of one additional eligible for each vacancy may be certified.**

La. Con. art. X, § 7 (emphasis added).

C. Role of Commission if Establishing Rules for Appointment and Promotion

The Commission has "broad and general" rulemaking authority for the "administration and regulation of the classified service, including the power to adopt rules regulating ... employment...." La. Con. art. X, § 10(A)(1)(a). The only check on this "broad and general"

rulemaking authority is that the rules must ensure that appointments and promotions of individuals to the City's classified service are "based upon merit, efficiency, fitness, and length of service, as ascertained by examination which, so far as practical, shall be competitive." *Id.* at art. X, § 7. Through their challenges, the Firefighters ask the Commission to determine whether or not NOFD's promotions to Fire Captain in 2016 met these requirements. In other words, we must determine if NOFD made promotions based upon merit, efficiency, fitness, and length of service as determined by a competitive examination.

When it adopted the GPTWI rule changes, the Commission was, as Delegates Abraham and Dennery discussed, "setting up its rule[s] to certify more than three" candidates. In objecting to the GPTWI rule amendments, employee groups pointed to language in the Revised Statutes:

> The director ***shall***, subject to the rules, thereupon ***certify*** to the appointing authority the names of ***three eligibles*** for such position of the class of the vacant position, and if more than one vacancy is to be filled the name of one additional eligible for each additional vacancy

La. Rev. Stat. Ann. § 33:2416.

This language, or language nearly identical, has been part of the Revised Statutes since 1940. Therefore, the drafters of the 1955 Constitutional Amendments and the delegates to the 1973 Constitutional Convention had the opportunity to simply carry this language over to the Constitution. **They declined to do so**. Instead, the Constitution has the phrase "not less than three." And, it is the Constitutional provisions that apply to the Civil Service System for the City of New Orleans not the Revised Statutes. By amending the rules to remove statutory language, the Commission has created the possibility that more than three names may be certified. The Commission used this same flexibility in 1982 when it adopted the practice of "banding" candidates who, based on "psychometric properties," were considered "tied." (*See* C.S. Rule V, §

5.1). In "banding" there could be far more than three individuals certified for promotion and an appointing authoring had unfettered discretion in choosing among candidates in the same band.

D. Adoption of GPTWI

In proposing the GPTWI rule changes then-Chief Administrative Officer ("CAO") Andrew Kopplin stated that the changes would lead to "better hiring techniques, better careers for employees, better pay, better processes and better training for employees." (Comm. Min. 4/21/2014 at p. 1). At the same time, Mr. Kopplin expressed a commitment to ensure "all personnel decisions are based on merit and that they incorporate best practices." *Id.* One of the goals expressed by the CAO was to "eliminate the falsely objective rankings based on exams" and "allow managers to interview all the Civil Service Department certified eligible candidates and hire the best qualified one." (GPTWI Overview 4/21/2014).

During presentations before the Commission, Dr. Charlotte Parent – then Director of the City's Department of Health – posed a hypothetical in which candidates for a position were ranked solely by test score. In this hypothetical, the highest scoring candidates lacked attributes and valuable experience possessed by those who scored slightly lower. Worse still, some of these hypothetical high-scoring candidates were "poor communicators" while some low-scoring candidates were simply "not good test takers," but had over ten years of relevant experience and often took the initiative on projects **according to performance evaluations**. The obvious purpose of Dr. Parent's hypothetical was to demonstrate the latent inequity and inefficiency caused by grouping candidates solely by test score. Such an approach, claimed Dr. Parent, essentially rendered other attributes "unusable." She urged the Commission to allow the Health Department, and other appointing authorities, to take into account "other metrics" when considering hiring and promotion to the classified service. The Commissioners were/are sensitive to this concern.

In response, Personnel Director Lisa Hudson expressed support for making changes but cautioned the Commission that changes should be consistent with the Louisiana Constitution and the merit-based concept of the civil service system. She also encouraged the Commission to adopt changes that would foster "trust" in the integrity of the hiring, promotion and compensation of City employees. (Comm. Min. 4/21/2014 at p. 2). One of the concerns voiced by Department staff members in response to the proposed rule changes was a concern that appointing authorities would not possess the expertise or experience to develop legally defensible selection procedures. Among the hypotheticals presented by the Department was one wherein a hiring manager passed over higher-scoring candidates, including one with veteran's status, for no apparent reason. Such a personnel action arguably exposed the City to extensive litigation.

During the public comment period for the April 21, 2014 Commission meeting, the Bureau of Governmental Research's ("BGR") then-CEO, Janet Howard, addressed the Commission and urged support for rule changes that would increase managerial discretion in hiring, promotion, and compensation. In doing so, Ms. Howard acknowledged that any increase in managerial discretion "increases the risk of abuse," but argued that the civil service system in place at the time was "out of balance." In order to restore balance and update the system, Ms. Howard pressed the Commission to adopt the GPTWI rule changes but leave in place "sufficient safeguards." Such safeguards would allow the Department and Commission to enforce the rules and monitor the outcomes of the rule changes. In monitoring the changes, those present assumed the Commission would be in a position to identify and address problems. (4/21/2014 Commission Meeting at 1:56:00-1:58:18).

As part of the Administration's presentation regarding the legality of the Rule changes proposed under the GPTWI, Ms. Kimberly Robinson, attorney for the City, acknowledged that the

purpose behind the so-called "rule of three" was to ensure that there was a **rational basis** for employment decisions and protect against hiring managers making decisions to benefit their friends or family. (6/12/2014 Commission Meeting at 46:40-47:38). Ms. Robinson argued that the rule changes would be consistent with the constitutional requirement that appointing authorities make employment decisions after consideration of merit-based factors.

Mr. Kopplin complained that, in addition to being restrictive, the existing Civil Service Rules did not require appointing authorities to account for employment decisions. For example, Mr. Kopplin observed that an appointing authority did not have to justify skipping over individuals within a "scoring band" established by Civil Service. A better system would allow appointing authorities, "on an objective basis, **that is documented and challengeable**, be able to select the candidate who is the best fit for the job." (6/12/2014 Commission Meeting at 54:03-54:10)(emphasis added).

In response, Commissioner McClain asked Mr. Kopplin, what specific objective criteria would replace the test score. Commissioner McClain's concern was that a promotional process based on test scores would be replaced by a "wide and capricious" decision making process with no objectivity or transparency. Alexandra Norton, then-Director of Innovation, responded to Commissioner McClain's question and acknowledged that there would be "a risk" in allowing hiring managers to select from a wider group of applicants. To mitigate that risk, Ms. Norton represented that appointing authorities would "establish sound, second wave examinations for competitive positions." (6/12/2014 Commission Meeting at 57:00-57:33). According to Ms. Norton, the "second wave" of examinations could incorporate a "structured interview" in which a panel would ask a series of pre-determined questions. Ms. Norton suggested that such interviews could be monitored by the Civil Service Department to ensure uniformity and equity. Ms.

Robinson circled back around to this point during her closing comments and represented to the Commission that the State Civil Service Commission had adopted a structured interview process that included interview questions that were reviewed by the State Civil Service Department and "approved in advance" (6/12/2014 Commission Meeting at 1:12:50-1:13:24). Throughout her comments, Ms. Robinson acknowledged the value of an objective process.

NOFD Superintendent Timothy McConnell also spoke in support of the amendments and assured the Commission that other objective assessment criteria would be used in conjunction with test scores "with the approval of the Civil Service Department" and oversight by the Commission. (6/12/2014 Commission Meeting 1:59:47-1:59:58). Then, Superintendent McConnell implored the Commission to adopt a system that would allow an appointing authority to require that all applicants submit a resume and allow appointing authorities to assess all of the applicants' "relevant training." As a safeguard, he noted that the Civil Service Department would be in a position to review the selection criteria and approve the training and education as relevant. (6/12/2014 Commission Meeting at 1:59:59-2:02:00). Finally, Superintendent McConnell derided the current system as out of touch with reality because it was "ridiculous" that an appointing authority could not consider, for example, extensive training and experience a candidate may have obtained in another municipality or private company.

At the next Commission meeting, the Administration's representatives began their presentation by introducing the Commission to Bill Rousell from Bright Moments. Mr. Rousell served as a mediator between employee groups and the Administration regarding the GPTWI rule changes and facilitated some of the discussions between members of the Administration and employee groups, including various unions. The biggest concern Mr. Rousell identified in the course of his discussions with employee groups was a lack of trust on the part of the employees.

Simply put, employees did not trust that managers would make hiring and promotion decisions based on merit as opposed to favoritism.

From Mr. Rousell's perspective, the existing civil service system was outdated and lacked transparency. He supported the GPTWI rule changes, especially the change to the "rule of three," because, in his view, it would require managers to "provide a job-related reason for passing over employees [and applicants] on a list." (8/15/2014 Commission Meeting at 40:00-40:12). As the system currently worked, Mr. Rousell saw no accountability or transparency and believed that managers did not have to give any reason for passing over an applicant within a scoring band. Mr. Rousell advocated for the removal of the rule of three and asked the Commission to "**replace it with a transparent procedure that would require a department head to provide a job-related reason for not selecting [someone on the list] starting at the top of the list.**" (8/15/2014 Commission Meeting at 43:00-43:27). Doing so, posited Mr. Rousell, would build trust in the system and offer faster and less complex hiring and promotional opportunities. For Mr. Rousell, the key to the process would be the role the Commission played in monitoring the rule changes to ensure they accomplished the stated goals.

BGR's Janet Howard addressed the Commission again on August 25, 2014 and observed that, 80 years ago, BGR called for the end of the spoils system. (8/25/2014 Commission Meeting at 1:34:40- 1:37:35). The original intent of the Civil Service System was the elimination of favoritism and political patronage in public employment. However, Ms. Howard believed that the "pendulum" had swung too far away from managerial discretion. She believed that the GPTWI rules would usher in a culture of performance through a better evaluation system, provide more training opportunities and impose realistic deadlines on the Civil Service Department. She did, however, ask the Commission to preserve the "core principles" of a merit-based system where a

manager could hire the "best suited" candidate based on **transparent and job-related factors**. Ms. Howard acknowledged that risks were inherent in extending discretion but noted that the Commission could closely monitor and regulate the application of the new rules.

Commissioner McClain posed a question to Ms. Howard about the possibility of a "sunset provision" that would allow the Commission to reconsider the rule changes if abuses became rampant. Ms. Howard responded that BGR supported a reconsideration of the rules and observed that the Commission had a "duty to step in" if the ills predicted by the Department and classified employees came about or if the Commission started seeing patterns of discrimination. In conclusion, Ms. Howard stated that a key element to the GPTWI rule changes was the Commission's "active obligation" to oversee implementation of the changes. BGR believed that, if the Commission became aware of abuses, it had "an affirmative obligation to step in and stop it." (8/25/2014 Commission Meeting at 1:39:14-1:40:15).

The instant investigation represents one of the safeguards that the Commission retained in order to ensure that appointing authorities remained faithful to the principles expressed during the adoption of the GPTWI.

III. ANALYSIS

A. Creation of the Fire Captain Eligible List

The Civil Service Department employed a rigorous process to develop and administer the Fire Captain's exam. Rick Carter, a Personnel Administrator employed by the Civil Service Department, took the lead in test development and worked with subject matter experts ("SMEs") hand-picked by NOFD from the ranks of existing managerial staff. Mr. Carter collected input from these SMEs regarding vital knowledge, skills and abilities that all good Fire Captains should demonstrate. The record contains an "information bulletin" issued to potential candidates that

contains, in excruciating detail, the subjects tested by the promotional exam along with respective weights of each subject. For example, "Knowledge of Technical Firefighting Tactics & Strategies" has approximately twice the weight as any other subject. (App. Exh. 2). The bulletin also lays out the type of knowledge tested through this subject, including, "fire suppression theories, methods, and practices," and "procedures for controlling utilities at an incident." *Id.*

There were two components to the exam, the first component was a multiple choice test and the second was a scenario-based oral exam administered by Department staff. During the oral exam, proctors presented various job-related scenarios to candidates for promotion and the candidates had to explain how he or she would respond. The Department made audio recordings of the candidates' answers. To ensure an independent assessment process, the Department retained the services of professionals from other Fire Departments to score the examinations. Once the examinations were scored, the Department generated a ranked list according to score and provided it to NOFD. The Department transmitted that list to NOFD on April 20, 2016. (App. Exh. 4). A total of 120 applicants to the classification of "Fire Captain" passed the examination. *Id.*

B. Application of NOFD's Promotional Policy

Three months after receiving the ranked list from Civil Service, NOFD released promotional procedures (hereinafter "ADM-27") upon which it would rely in making promotional decisions. There were a total of fifteen factors NOFD represented would guide promotional decisions.

1. Effective application of department's safety and accountability procedures, and initiatives;
2. Support for and effective implementation of the department's fire prevention strategies and initiatives;
3. Performance history;
4. Disciplinary history;
5. Education;
6. Resume;
7. Training;

8. Demonstrated leadership;
9. Interpersonal skills;
10. Problem-solving skills;
11. Years of service;
12. Civil Service examination score;
13. Commendations, awards, recognition and accomplishments;
14. Relevant experience; and
15. Additional relevant considerations, including any additional materials the candidates may wish to submit.

Additionally, ADM-27 required that, any candidate must first appear before the promotional committee for an interview in order to be selected for a promotion. Superintendent McConnell testified that he relied in part on the interview to screen candidates for the position but refused to disclose the interview questions during the course of the Personnel Director's hearing. His justification for such refusal was his desire to use the same questions in future promotional interviews. (Tr. v. 1 at 30:4-31:5). Importantly, not every candidate was selected for an interview. NOFD interviewed forty-seven (47) top scoring candidates as well as sixteen (16) additional candidates who did not score as well for a total of sixty-three (63).

The Personnel Director described the fifteen factors in ADM-27 as "desirable qualifications." The Commission disagrees. When used in the context of Rule VI, § 2.1, an appointing authority's submission of "desirable qualifications" is part of the underlying development/revisions of the classification and subsequent announcement. The fifteen factors in ADM-27 represent an apparent attempt by NOFD to introduce competition into the selection process by identifying attributes that would allow decision-makers to differentiate one candidate from another.

Unfortunately, none of the fifteen factors allowed an applicant to divine what the promotional committee would consider a valuable trait. For example, one of the fifteen factors was "training." This has limited value to a candidate seeking to differentiate herself from others.

If, on the other hand, the factors included "training in vehicle extraction" or "training in swift water rescue" such specificity would have provided clarity and the added bonus of incentivizing valuable training across the department. In the same vein, "education" is an amorphous attribute without additional detail. For example, one candidate for Captain had a degree in Fine Arts. While laudable, such a degree, in and of itself, does not appear to add value to NOFD. Alternatively, at least two candidates held degrees from Tulane University in Emergency Management. The Commission recognizes the value such education brings to NOFD but ADM-27 did not differentiate between a degree in Fine Arts and a degree in Emergency Management.

NOFD also chose not to differentiate between those that performed well on the Fire Captain's exam and those that did not. In NOFD's view, "everyone was equal that passed the test and was qualified to be promoted." *Id.* at 177:8-9. Given the time that both Civil Service and NOFD personnel dedicated to the development of the Fire Captain exam, the Commission would have expected NOFD to attach at least some importance to a candidate's performance on the exam. In fact, when advocating for adoption of the GPTWI, members of the Administration assured the Commission that test results were "important" when considering appointments or promotions. NOFD attempted to defend its decision to treat the Captain's Exam as a pass/fail exercise by pointing out that it did not actually know a candidate's exact test score. It was not clear what point NOFD was attempting to make in emphasizing this fact. Each candidate's score was readily available to NOFD. In fact, it would have been possible for NOFD to look at each "knowledge competency" and compare the candidates' scores. Members of the promotional committee could also have used scores to validate impressions they had of candidates based upon interviews and/or training the candidate claimed to have. If NOFD wanted to dive deeper into the exam results, it need only to have asked Civil Service for that information. It did not.

There were other, more subjective measures that also gave the majority pause. As more than one Commissioner observed at the February 2018 meeting, it was fair for NOFD to expect that successful candidates for the position of NOFD Captain to support the "effective implementation of fire prevention strategies." This is not an inherently improper factor. The majority observes, however, that it would expect to see a rating of an employee's "support for and effective implementation" of department policies to be contained within **an evaluation**. Because of a lack of documentation on the part of NOFD, the majority is at a loss to determine how NOFD assessed this factor when culling through the 120 Fire Captain Candidates. Similarly, any evidence NOFD had that an employee was attempting to undermine departmental policy or refusing to implement a departmental initiative would be (or should have been) reflected in disciplinary action or – at the very least – in a performance evaluation. There is no such evidence in the record.

The majority is left to assume that NOFD attempted to determine a candidate's "support for" fire prevention strategies through the interview process. This is a poor vehicle for such an inquiry for a variety of reasons. The first of which is that the interview setting does not necessarily encourage candor. Another reason is that an interviewer is ill-equipped to assess past job performance unless he or she has specific knowledge of a candidate's work. Since the promotional committee did not speak with any of the candidates' direct supervisors, they were not in a position to fact check any general assertions candidates made regarding how they supported the implementation of certain department policies and practices.

Deputy Chief Eiserloh was apparently the only member of NOFD's promotional committee with some personal knowledge of certain candidates' job performance. But he kept that knowledge to himself because he did not want to "try to persuade the other deputy superintendents of who to pick." (Tr. v. 3 at 75:6-13). In fact, feedback from supervisors did not enter into the promotional

committee's deliberative process outside of one or two sentences that may or may not be written on a candidate's performance evaluation. *Id.* at 75:14-23. The value of a candidate's performance evaluation is limited given that almost every candidate had a nearly identical performance rating. (*See* Tr. v. 1 at 42:4-7, 43:1-4).

As best as the Commission can determine, Superintendent McConnell's assessment of this promotional factor was based entirely upon a question he posed about firefighters canvassing neighborhoods to install smoke detectors. (Tr. v. 4 at 57:4-22). The record is silent on how NOFD evaluated a candidate's response to this question since some candidates who were promoted testified that they told Superintendent McConnell that they supported the initiative and others expressed reservations based upon safety concerns.

NOFD interviewed sixty-three out of the 120 eligible candidates. As we noted, NOFD interviewed the top scoring forty-seven (47) candidates. (Tr. v. 1 at 65:15-18). At first blush, this fact suggests that a candidate's test score played a factor in determining whether or not he or she had the opportunity to interview for a promotion. However, NOFD also selected an additional sixteen (16) candidates "from all over the list" for an interview allegedly based on the fifteen factors. *Id.* at 65:7-10. Every single candidate NOFD selected for an interview outside of the top forty-seven was promoted. Absent evidence to the contrary, this tends to support the Firefighters' contention that NOFD knew who it wanted to promote before even conducting interviews. NOFD had an opportunity to rebut this contention. Yet, when asked why he selected some candidates to interview over others, Superintendent McConnell testified that it was based generally on the fifteen factors and did not articulate a specific reason.

The Commissioners do not expect an appointing authority to interview every candidate that applies for a position. However, in the matter now before us, NOFD initially put all those who

passed the Fire Captain's exam on equal footing and deemed them all equally qualified. It was then up to NOFD to differentiate the 120 qualified candidates based on a **competitive** process that took into account "merit, efficiency, fitness, and length of service." NOFD appears to have been very deliberate in its selection of candidates to interview outside of the top forty-seven. Something must have set these sixteen candidates apart from their peers given that these sixteen candidates were not only selected for an interview, but ultimately promoted. The record would have benefited from an explanation on how NOFD selected these sixteen candidates for an interview.

IV. FINDINGS

The Commission finds that a burden-shifting analysis is appropriate when investigating the propriety of appointments and promotions. In order to establish a prima facie case that an appointment or promotion violated the Rules or Constitution, an "appellant" must show; 1) he/she was eligible for the promotion or appointment at issue, 2) the appointing authority failed to appoint or promote him/her, and 3) the appointment and/or promotion that the appointing authority did make failed to adhere to a specific Rule or Constitutional Provision. Like a retaliation case, at the prima facie stage, the appellant's burden is lighter than it would be at the final stage. The burden then shifts to the appointing authority to articulate a merit-based reason for the appointment or promotion. An appellant bears the ultimate burden of establishing that the reason proffered by the appointing authority is pretext for a prohibited and/or unlawful reason.

A. Prima Facie Case

1. ADM-27 and Merit Based Factors

There is no dispute that the Firefighters who brought the instant challenge were both eligible for the promotion to Fire Captain and were passed over. The question left for the Commission is whether or not the Firefighters sufficiently alleged that NOFD's promotion of Fire

Captain violated a specific Rule or Constitutional provision. The provision cited by the Firefighters was Article X, Section 7 of the Louisiana constitution.

The Commission appreciates the candor and passion with which the Firefighters approached the Commission. To the Firefighters' credit, they acknowledged that some of the criteria identified in ADM-27 was in fact "merit based" in principle. Importantly, the Firefighters did not necessarily object to the fifteen factors but rather took issue with the manner in which NOFD supposedly applied those factors. Based upon the Commission's analysis, we find that the Firefighters introduced enough evidence to call into question NOFD's claim that it made its promotional decisions after consideration of the merit-based factors identified in ADM-27. This shifted the burden to NOFD to produce evidence that it applied merit-based factors in its promotional decisions. Unfortunately, NOFD failed to introduce any evidence to suggest that it actually adhered to the standards it created in ADM-27. It also failed to present any testimony on how it implemented a competitive selection process. At the end of the day, with one or two exceptions, no NOFD witnesses were able to articulate why some individuals were promoted over others.[1]

The Louisiana Constitution mandates that the Commission administer rules that ensure appointing authorities make promotions using merit-based factors. This necessarily requires a certain degree of transparency and accountability. The tension that existed prior to the adoption of the GPTWI was that appointing authorities sought to promote individuals based upon traits that were either not tested or very difficult to test. And, through ADM-27, NOFD did identify several

[1] Superintendent McConnell testified at length as to the added value a candidate's paramedic training brought to NOFD. (Tr. v. 4 at 45:19-46:11). Approximately two-thirds of NOFD's calls have a medical component and a Fire Captain with paramedic training would be in a positon to leverage his or her expertise in rendering assistance to residents and providing direction to his subordinates. Only one candidate, Marquies Gray, had paramedic training. *Id.* at 46:12-15. This was one – and perhaps the only – example in the record where NOFD provided a job-related reason that rebutted the Firefighters' claims that the promotions were not merit-based.

difficult-to-measure factors that, on their face, were merit-based and relevant to a Fire Captain's ability to succeed. Making a promotional decision based upon factors such as relevant training, experience, demonstrated leadership and successful implementation of departmental initiatives benefits both the department and the community at large.

The majority's most pressing concern regarding the process through which NOFD made its promotional decisions was that it introduced fifteen different criteria that had little, if any, defined values. The undersigned had many of the same concerns expressed by the Personnel Director when assessing the fifteen criteria. For example, while some of the criteria were arguably objective (i.e., years of service, test score, disciplinary history, performance history), there was no testimony on how these objective measures were analyzed in conjunction with subjective measures (i.e., demonstrated leadership, problem-solving skills, effective implementation of the department's fire prevention strategies and initiatives). The Commission notes that, even prior to the GPTWI rule changes, analysts in the Department used subjective judgments to ranking candidates for promotion.[2] NOFD, however, took this to an entirely new level and did not combine discretion with documentation or transparency. By combining objective and subjective factors without providing any defined values or measurements, NOFD could not establish that the 2016 Fire Captain promotions were "competitive" and "merit-based."

2. Interviews

NOFD suggested that interviewing all 120 candidates on the promotional register was not feasible. On a basic level, the majority appreciates that an employer seeking to fill a position for which there are numerous applicants does not have time to interview each applicant. In such

[2] For most promotional positions in the City's Civil Service System, 100% of the "examination" consists of a rating of a candidate's training and experience. While the Department employs standards to assess training and experience, there is certainly an element of subjectivity present.

situations, the employer will develop metrics that differentiate one candidate from the next and make decisions on who to interview accordingly. Here, NOFD did not provide any insight on how it made the decision to interview some candidates and not others apart from assuring the Commission that it interviewed the top forty-seven scoring candidates. The utter lack of transparency into this process is especially troubling since half the applicants were not interviewed and thus not "eligible" for promotion according to NOFD's promotional policy. The problem is compounded by NOFD's decision to apparently target sixteen individuals outside of the top forty-seven for interviews and eventually, promotions. The Commission does not believe that it was a coincidence that these sixteen individuals were selected. NOFD was implementing some manner of strategy. This strategy may have been appropriate and within a merit-based system, but there is nothing in the record that speaks to this strategy other than a vague assurance by NOFD that the decision to promote and interview was based on a consideration of the fifteen ADM-27 factors.

The majority is also troubled by the lack of a structured interview. We do not know the questions posed to candidates during the screening process.[3] And, for reasons that all Parties left unanswered, Superintendent McConnell destroyed all of the notes he took during the interview process. (Tr. v. 1 at 34:2-13). Even if the notes were not "substantive" they may have shed some light on the deliberative process employed by the promotional committee. Instead, there was only a vague assertion that the promotional committee weighed the fifteen factors identified in ADM-27 when making recommendations and decisions. Ideally, NOFD would have developed questions to ask each candidate based upon pre-determined, job-relevant scenarios or characteristics. It then would have been able to rate each candidate's responses to the questions based upon a scoring

[3] If NOFD was worried about the public release of the questions, it could have arranged for an *in camera* review of the questions and had them sealed from public disclosure.

rubric and compared that rating to other candidates.[4] This in turn would have rendered the interview process a competitive examination under the Commission's rules. (*See* C.S. Rule I, ¶ 33).

In 2014, representatives of the administration specifically mentioned a structured interview process and pointed to the process adopted by the State Civil Service Commission as a model. The same representative then assured the Commission that a structured interview would be a tool used by appointing authorities and went so far as to suggest that the Civil Service Department would be able to review the interview questions in advance and monitor the interview process. None of that has happened. In fact, NOFD refused repeated requests from the Civil Service Department and the Personnel Director's hearing examiner to produce the questions posed to candidates. It would be hard for this Commission to envision a more striking example of a specific safeguard contemplated at the meeting but not implemented by the appointing authority.

B. Disparate Impact

Although neither party had alleged discrimination based upon race or sex, the Personnel Director took it upon herself to conduct a disparate impact analysis. The Personnel Director speculated that NOFD made its promotions with the goal of creating a "more representative Fire Department." Yet, neither Party raised this as an issue, and there was no testimony regarding the degree, if any, that race and/or gender played in NOFD's decision to promote applicants to the position of Fire Captain. When the Personnel Director designated a hearing examiner to determine the facts of the case, the race and gender of promoted candidates was not identified as factors under consideration.

[4] The majority would be remiss if it did not point out that the structured interview process described in this section is very similar to the oral portion of the 2016 Fire Captains exam.

Further, neither the Commission nor the Personnel Director had any data regarding whether or not women and minority candidates were historically under-represented in the ranks (the Commission strongly suspects that this was the case, but the record is utterly devoid of any evidence or testimony to this effect). The word "race" was not used by any individual during the course of four days of hearing.

The Personnel Director raised valid points and concerns, but did so in a way that blind-sided both Parties by relying upon assertions that went unexplored during the course of the hearing. At the very least, NOFD should have been provided with an opportunity to review the findings and respond. Had the Firefighters or hearing examiner raised the issue of disparate impact, there would have been ample opportunity over the course of four days to find time to address this important issue.[5]

Title VII of the Civil Rights Act of 1964 prohibits employers from using employment practices that cause a disparate impact on the basis of race (among other bases). 42 U.S.C. § 2000e–2(k)(1)(A)(i). In applying Title VII's prohibition against disparate impact, the Supreme Court has observed that "a plaintiff establishes a prima facie disparate-impact claim by showing that the employer uses a particular employment practice that causes a disparate impact" on one of the prohibited bases. *Lewis v. City of Chicago, Ill.*, 560 U.S. 205, 212, 130 S.Ct. 2191, 2197–98, 176 L.Ed.2d 967 (2010). The plaintiff makes such a showing by introducing evidence of a "significant statistical disparity." *Ricci v. DeStefano*, 557 U.S. 557, 587, 129 S.Ct. 2658, 2678, 174 L.Ed.2d 490 (2009). Once a plaintiff makes such a showing, the burden shifts to the employer to

[5] The briefs submitted by the Parties to the Commission in advance of the instant investigation were not the appropriate vehicle to address the Personnel Director's assertions regarding disparate impact. As a preliminary matter, such briefs are not the vehicle to introduce new information. Thus, the Parties were in a no-man's land, forced to respond to a previously unarticulated claim of impermissible discrimination, despite the fact that the Commission's Rules have very specific pleading requirements when it comes to allegations of discrimination.

demonstrate that the employment practice at issue was "job related" and "consistent with business necessity."

The Louisiana Constitution prohibits appointing authorities from discriminating against classified employees on the basis of political beliefs, religious beliefs, sex, or race. La. Con. art. X, § 8(B). Any classified employee who believes that he or she has been the victim of unconstitutional discrimination has the right to bring an appeal before the Commission. In bringing such an appeal, an employee must state, with some specificity; a) the type of discrimination, b) the persons who allegedly perpetrated the discriminatory act, c) the date of such act, and d) the manner in which the act occurred. C.S. Rule II, § 4.7. The purpose of specific pleading requirements is to ensure a focused inquiry.

In the matter now before the Commission, none of the firefighters challenging the promotional practices of NOFD alleged discrimination in accordance with our rules. The Personnel Director acknowledged this fact in her decision noting that, "discrimination was not expressly raised." The Commission emphasizes that none of the Parties to this litigation even "implicitly" raised the issue of race or gender discrimination. The Firefighters cited to Article X, Section 7 of the Louisiana Constitution and asserted that the promotions were not undertaken pursuant "to a general system based upon merit, efficiency, fitness, and length of service, as ascertained by an examination which, so far as practical, shall be competitive." The word "race" does not even appear in the transcript.

In demonstrating a disparate impact, the plaintiff must focus on a "particular challenged employment practice" unless the elements of an employer's decision-making process are not capable of separation for analysis. 42 U.S.C.A. § 2000e-2(k)(1)(B)(i) (West). In such instances, the decision-making process may be analyzed as one employment practice. *Id.* Here, had the

Firefighters brought a disparate impact claim, a Title VII analysis would have required a determination if a particular factor favored one employee group over another on the basis of race. But, neither the Firefighters nor Hearing Examiner considered whether one or more of the fifteen elements in ADM-27 favored African-American candidates over other candidates. This is likely because the Firefighters did not make an assertion that any of the fifteen factors favored one race over another. As a result, NOFD did not have an opportunity to defend itself against disparate impact claims. The Commission shares the Personnel Director's general concerns regarding the statistical analysis, but it is only one part of a disparate impact case that was not before the Personnel Director. At best, NOFD should take the finding as a cautionary tale regarding an over-reliance on subjective measures in employment decisions.

In the end, NOFD was defending itself against a claim that it had violated the Louisiana Constitution when it promoted employees to Fire Captain. It made strategic decisions regarding preparation, evidence, testimony and questioning based upon the claims made by Appellants. Nowhere in the documents filed by Appellants does the Commission find anything that would put NOFD on notice that it needed to defend itself against a claim of disparate impact under Title VII. The Commission makes this observation without passing judgment on whether or not a firefighter would have prevailed in such a case.

The Personnel Director adopted the **State** Civil Service's definition of "discrimination" in finding that the NOFD applied the Commission's rules in a discriminatory manner because it could not establish that promotional decisions were merit-based. This Commission has not yet adopted such a definition. The Personnel Director went on to find that the promotional decisions "might" have included considerations of race. "Might" is not the standard of proof that applies in such decisions. Even if Appellants had alleged discrimination, their burden of proof would have been

by a preponderance of the evidence. The Commission agrees that NOFD did not establish that its decisions were merit based, but that is a far cry in finding that it was more likely than not that its decisions were motivated by race or sex. Neither Party litigated that issue before the hearing examiner. The Personnel Director criticized NOFD for not providing the hearing examiner with a reason for giving preference to black applicants over white applicants. NOFD witnesses were never asked this question or provided with the disparate impact data. The reason why is obvious. None of the Firefighters brought a claim of discrimination before the hearing examiner.

V. CONCLUSION

The Commission finds that NOFD failed to adhere to the requirements of Article X, Section 7 of the Louisiana Constitution when it implemented a promotional scheme that was not merit-based or competitive. In making this finding, the majority acknowledges that part of NOFD's failure is a product of the Commission's own failure to actively monitor the implementation of the GPTWI. The Commission changed its Rules to provide appointing authorities with more autonomy. But in granting this autonomy, the Commission failed to put into practice the words of caution expressed by BGR's Janet Howard and others. There must be sufficient safeguards in place to prevent appointments and promotions based on factors other than merit. The majority assumed that, when called to do so, appointing authorities would be able to articulate the reason why one candidate was hired or promoted over another. Furthermore, we expected that applicants would have adequate notice of the factors upon which an appointing authority will rely in making hiring and promotion decisions.

The ruling we make today should not be viewed as a suggestion that an appointing authority cannot establish promotional criteria consistent with merit-based principles.[6] However, when an

[6] In her decision, the Personnel Director appears to suggest that there is no manner in which an appointing authority could apply the GPTWI rule changes in a way consistent with the Louisiana Constitution. We disagree.

appointing authority develops promotional criteria after the development of a list of eligible employees, and cannot articulate reasons why some employees were promoted over others when the promotions are challenged, it sows distrust among all employees.

For illustrative purposes only, the Commission provides the following sample rubric based upon possible applicant attributes. Actual, job-related attributes would depend heavily upon NOFD's needs within the Captain rank. In using this rubric, the Commission assumes that each candidate who passes the exam would be assigned the same base score.

Attribute	**+15 points**	**+10 points**	**+5 Points**
Training	Vehicle Extraction, HazMat technician	Confined space technician, swift water rescue	Rope rescue, structural collapse technician
Civil Service Examination Score	Top 5%	Top 10%	Top 15%
Veteran Status[7]		Honorable discharge and one or more service-related disability; widowed spouse of veteran.	Honorable service in U.S. armed forces.
Education	Master's degree in Emergency Management, Business Administration, Civil Engineering or related field	Bachelor's degree in Emergency Management, Business Administration, Civil Engineering or related field	Advanced degree
Certification	Paramedic		
Evaluations	Exceeds Expectations & contains evidence of development and implementation of innovative fire prevention strategies	Exceeds Expectations & contains evidence of support for development and implementation of innovative fire prevention strategies.	Contains evidence of support for implementation of innovative fire prevention strategies.

[7] The preference points listed in this category are mandated by Article X, Section 10(A)(2) of the Louisiana Constitution.

Experience[8]	20 years of experience in fire protection services	15 years of experience in fire protection services	10 years of experience in fire protection services

As noted, the rubric above is purely for illustrative purposes and does not reflect the value NOFD should/would assign to any attribute or qualification. We agree generally with the Personnel Director that, had NOFD made promotional decisions informed in part by examination scores and then reached further down the list for "well-articulated reasons" the Commission would have been in a position to find such decisions were informed by a competitive, merit-based system. As it stands, there is no evidence that provides insight on how NOFD made the decisions that it did. This is in stark contrast to the repeated assurances provided to the Commission that the GPTWI rule amendments would create more transparency and accountability in the hiring and promotion of classified employees.

The majority also observes that representatives from the City indicated that the Civil Service Department would play an important role in monitoring the appointment and promotion process. Yet, there was no attempt on the part of NOFD to work with the Civil Service Department in developing ADM-27. It was only after it had developed its policy that NOFD released it to members of the Civil Service Department. The Rules, as currently written, do not require preapproval from the Civil Service Department prior to the implementation of a promotional policy, but given NOFD's poor record keeping and inability to justify its decision, other appointing authorities would be well served in seeking the Department's blessing before implementing any personnel policy.

[8] The current minimum qualification for applicants to the position of Fire Captain is six total years of experience in a firefighter classification within NOFD. The Commission contemplates that NOFD may want to consider experience acquired by a candidate outside of NOFD as an objective factor in promotional decisions.

VI. REMEDY

In her decision, the Personnel Director observes that those promoted to Fire Captain in 2016 "arguably have a [vested property] interest in their position[s]." The Commission does not agree that the interest is "arguable." As explained below, the Commission finds that those promoted to Fire Captain in 2016 have obtained permanent status and have a vested right in that status.

By function of the Commission's own rules, those NOFD Captains promoted in 2016 have obtained permanent status. (NOFD Exh. 4; C.S. Rule I, ¶ 64). And, "because a classified permanent employee enjoys a property right in maintaining his ***status***, it is axiomatic that his position may not be changed or abolished without due process of law." *Perry v. City of New Orleans*, 2011-0901 (La.App. 4 Cir. 2/1/12, 6–7), 104 So.3d 453, 456–57, *decision clarified on reh'g* (Nov. 15, 2012)(quoting *Bell v. Dep't of Health & Human Res.*, 483 So.2d 945, 950 (La.1986)(emphasis added)); see also *Moore v. Ware*, 2001-3341 (La. 2/25/03, 12), 839 So.2d 940, 948 ("Tenured or classified civil service status is a property right and cannot be taken away without due process.") .

A majority of the Commissioners have found that NOFD applied the Commission's promotional rules in an unconstitutional manner. However, the promoted employees played no role in the constitutional violation. And, unlike past cases where courts or the Commission have displaced ineligible employees, the employees promoted in 2016 to the classification of Fire Captain met the minimum qualifications for the position and were on an active list of eligible candidates. The Commission's Rules contain limited provisions, outside of discipline, that would allow for the demotion of an employee who has obtained permanent status in his/her classification. One of those limited situations is when an employee does not meet the minimum qualifications of the higher classification. (C.S. Rule VI, § 3.3(a)). Even then, any action by an Appointing

Authority or the Commission that demotes or alters the permanent status of classified employees requires a showing of sufficient cause. A decision by the Commission that changes the promoted candidates' permanent status would constitute the deprivation of a property right without cause. Since the employees promoted to Captain in 2016 have not engaged in any misconduct and are part of this litigation only because they were promoted, the Commission shall not and cannot alter their status as permanent employees.

This brings the Commission to the second element of any contemplated remedy; how to address those firefighters passed over for promotion. Precedent from the Commission and Fourth Circuit prohibits the Commission from compelling NOFD from making promotions, especially where there are no budgeted vacancies. The Personnel Director's suggestion that the Commission mandate the promotion of numerous employees to Fire Captain is an untenable one.

The Commission and Fourth Circuit have acknowledged that appointing authorities have no "mandatory duty to promote." *Blake v. Giarrusso*, 263 So.2d 392, 394 (La. Ct. App.1972), *writ refused,* 262 La. 1154, 266 So.2d 442 (1972). Thus, the Commission does not have the authority to compel an appointing authority to make a specific promotion. *Appeal From a Ruling of Civil Serv. Comm'n for City of New Orleans in Matter of Bua v. Dep't of Police, Docket No. 6002*, 2004-0564 (La.App. 4 Cir. 2/2/05, 2), 894 So.2d 1214, 1216, *writ not considered sub nom. Bua v. Dep't of Police*, 2005-0988 (La. 6/3/05), 903 So.2d 441. Courts have also recognized the speculative nature of orders that would direct an appointing authority to promote specific individuals. *Maurice v. Dep't of Police*, 94-2368 (La.App. 4 Cir. 6/7/95, 8), 657 So.2d 501, 506; *Lechler v. City Civil Serv. Comm'n for Par. of Orleans*, 357 So.2d 41, 44 (La. Ct. App.1978), *writ denied sub*

nom. Lechler v. City Civil Serv. Comm'n, 359 So.2d 207 (La. 1978).[9] The Commission's power is limited to ensuring that when an appointing authority does make a promotion, it does so in a manner that is consistent with the Rules and Article X of the Louisiana Constitution.

The Commission intended the review process contained within Rule VI, Section 6.1 to serve as a safeguard against improper appointments and promotions. Unfortunately, the investigation into the Firefighters' claims took more than a year due to procedural wrangling and disputes over evidence. In the meantime, the clock began running on the Commission's ability to implement any meaningful remedy. For future cases, the Commission encourages aggrieved employees to seek a temporary stay in the running of any relevant working test period until the investigation runs its course.

With respect to NOFD's current promotional policy, a majority of the Commissioners have found that it did not pass constitutional muster. Therefore, the majority holds that NOFD cannot use ADM-27 in its current form for future promotions. Instead, NOFD must adopt a promotional policy that does more than simply provide lip service to a competitive, merit-based system. In hindsight, the Commission should have done more to ensure that sufficient safeguards were in place to encourage appointing authorities to be transparent in their promotional practices. In issuing its decision today, the Commission hopes that other appointing authorities recognize and appreciate their responsibility in building trust in the employment decisions they make.

[9] The *Lechler* decision involved a promotional list that had expired by the time the matter reached the Appellate level. Nevertheless, the Commission believes that the Fourth Circuit's reasoning in that matter is informative to its decision in the instant investigation.

Investigative Findings and Order Rendered this 24th day of May, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

MICHELLE D. CRAIG, CHAIRPERSON — DATE 5-11-18

STEPHEN CAPUTO, COMMISSIONER — DATE 5-11-18

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

STEVEN ACHORD, ET AL., vs. DEPARTMENT OF FIRE	DOCKET Nos.: 8610, 8642, 8614, 8613, 8609, 8641, 8615, 8648, 8616, 8646, 8643, 8617, 8602, 8618, 8603, 8619, 8620, 8621, 8606, 8622, 8608, 8640, 8612, 8623, 8611, 8624, 8625, 8626, 8605, 8627, 8628, 8593, 8607, 8630, 8631, 8632, 8633, 8634, 8635, 8636, 8637, 8638, 8639, 8647, 8604, 8655

VICE-CHAIRPERSON McCLAIN CONCURS IN PART; DISSENTS IN PART; AND ASSIGNS REASONS

I concur with the majority's statement of facts and review of the Commission's process in approving the GPTWI rule amendments. I also concur with the majority's decision – if not its reasoning – regarding the remedy. However, I respectfully dissent from the Commission's holding that NOFD somehow violated the Commission's Rules or Article X of the Louisiana Constitution when it promoted individuals to Fire Captain in 2016.

When members of the administration first proposed the GPTWI rule amendments, the Civil Service Department and Employee groups acknowledged that the Commission's rules were due for an update. As it became clear that there were many different opinions of what updates were necessary and appropriate, I asked the parties to try and work together. It was my hope that the Administration, Civil Service Department and Employee groups would work together and discuss ways in which the rules could be amended to recognize the changing landscape of employment in the 21st century. The Commission has developed its rules over the course of the past sixty-five years, and I did not think it was too much to ask that the parties dedicate a few months to work through their differences. The concern I repeated during the course of several meetings was that

each side had walled itself off from compromise and no version of the other side's proposals would ever be acceptable.

I strongly believe that additional meetings and discussions would have resulted in a better process. This was rushed through and now we are all paying for it. Too often the Civil Service Department and appointing authorities come before the Commission before fully vetting proposals and ideas. We as Commissioners must then mediate disputes in real-time instead of entertaining thoughtful discussions between two sides that have had time to whittle down a disagreement to a core issue or proposal. There are certainly times when another round of discussions would not be productive, but such instances are few and far between. Furthermore, the worst-case-scenario for additional discussions is a delay is one or two months. Here, one or two months of additional discussions may have avoided years of protracted litigation during which each side has taken a more and more adversarial posture. Compromise is not a dirty word and I would encourage those who do business before the Commission to use it more often. In the end, I abstained from voting for the GPTWI because it was clear to me that there was a great deal of work left to be done. Employee groups and the Civil Service Department are not blameless in this and failed to recognize the need to innovate and move on from an overly-restrictive appointment and promotion process. Finally, the Commission itself is at fault for failing to take a more active role in monitoring the roll-out of the new rules.

I dissent from the majority because the rules, as currently written, clearly provide for a great deal of independence and discretion on the part of appointing authorities when it comes to appointments and promotions. And, based upon the record before the Commission, I believe that NOFD has exercised its discretion in full compliance with the letter of the rules.

In dissenting from the majority, I do not mean to suggest that I endorse NOFD's approach. Far from it. I agree with the majority that, during the meetings that led to the GPTWI rule changes, representatives from the City assured the Commission that appointing authorities would be able to provide detailed reasons for each hire and promotion. And, in adopting the GPTWI, the Commission trusted this representation and did not insist upon any additional safeguards. This appears to have been a mistake.

In order to address this mistake, the Commission may want to consider revisiting the GPTWI to add safeguards or impose some manner of accountability for decisions. That is not something the Commission should undertake lightly and is not something it can do as part of this decision.

I also disagree with the majority's finding that NOFD violated Article X, Section 7 of the Louisiana Constitution. The factors identified in ADM-27 are merit-based factors and representatives from NOFD testified that they relied upon those factors in making promotions. That is all they had to do under the Rules. By adopting ADM-27, NOFD actually went above and beyond what was required by the Rules. If the rules required an appointing authority retain documentation justifying a promotional decision, then it would be fair for the Commission to ask NOFD to produce such records. For better or for worse, there is no such requirement and to read one into the rules after the fact is inappropriate.

At the end of its decision, the majority makes recommendations with respect to what NOFD and other appointing authorities should do to avoid litigation in the future. I believe that these suggestions are without weight or authority unless the Commission incorporates them into its rules. These are precisely the type of safeguards that the Commission should have considered in 2014

when employee groups and business groups were advocating for the Commission to retain protections against favoritism and political patronage.

In conclusion, I agree that the process used by NOFD did not match with the representations made to myself and other Commissioners in 2014. In order to address this, the Commission should consider revising its rules to put in place requirements.

Ronald P. McClain

RONALD P. McCLAIN

5-9-18

DATE

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

STEVEN ACHORD, ET AL., vs. DEPARTMENT OF FIRE	DOCKET Nos.: 8610, 8642, 8614, 8613, 8609, 8641, 8615, 8648, 8616, 8646, 8643, 8617, 8602, 8618, 8603, 8619, 8620, 8621, 8606, 8622, 8608, 8640, 8612, 8623, 8611, 8624, 8625, 8626, 8605, 8627, 8628, 8593, 8607, 8630, 8631, 8632, 8633, 8634, 8635, 8636, 8637, 8638, 8639, 8647, 8604, 8655

COMMISSIONER MOORE CONCURS IN PART; DISSENTS IN PART; AND ASSIGNS REASONS

I concur with the majority's statement of facts and review of the Commission's process in approving the GPTWI rule amendments. As evidenced by the meeting minutes quoted by the majority, employee groups, advocates and residents expressed deep concerns about the potential for abuse if appointing authorities had unfettered discretion in promotions and appointments. Various stakeholders asked the Commission to institute safeguards to protect against favoritism and political patronage. In response, the Commission put in place a process through which employees and applicants had the right to challenge appointments and promotions. Such challenges were intended to give the Commission the ability to oversee promotions and appointments and ensure that appointing authorities were following both the letter and the spirit of the amended rules. Clearly the challenge process did not serve its intended purpose and classified employees have suffered harm as a result.

I agree with Commissioner McClain that NOFD did not violate the letter of the rules adopted pursuant to the GPTWI and that is precisely my problem with the revised rules. Though the Civil Service Department, employees, business leaders, private citizens and even members of

the City's administration recognized the need for appointing authorities to make employment decisions based upon merit, there were no rules written to ensure this happened. And, almost immediately, the promotional process began to resemble the pre-Civil Service political landscape where personal relationships took precedent over qualifications. City employment once again has become more about who you know as opposed to what you know.

Speaking in support of the Civil Service System, a delegate form the 1973 Constitutional Convention noted that:

> [A] system whose basic and vital provisions are firmly entrenched in the constitution, will survive the periodic attempts to frustrate the principle of merit in public employment through the hurried adoption of unsound and ill-fostered, disabling and crippling legislative amendments.

Records of the Louisiana Constitutional Convention of 1973, Vol. 9 at 2622. Later, the Louisiana Supreme Court relied upon the 1973 convention transcripts in *Civil Service Commission of City of New Orleans v. Guste*, 428 So.2d 457 (La. 1983) and noted that:

> The delegates to the 1973 Constitutional Convention were of the expressed opinion that the Louisiana Legislature ought not be able to alter the powers or functions of the civil service commissions. Several constitutional convention delegates recalled first hand an earlier time in Louisiana's history when the Legislature so amended the civil service provisions in the constitution (when constitutionally permitted to do so by a two-thirds vote) as to render them *ineffectual*. Twice the delegates rejected proposals which would have allowed the Legislature by a two-thirds vote, or by even a three-fourths vote, to amend or modify the constitutional civil service provisions.

Civil Serv. Comm'n of City of New Orleans v. Guste, 428 So.2d 457, 461 (La.1983)(citing IX Transcripts from the 1973 Constitutional Convention 2595-2654)).

I am afraid that, with the revision of Rule VI, Section 3.1 through the GPTWI, the Commission has done what the state legislature could not and rendered the protections of Article X of the Louisiana Constitution "ineffectual." If, as the majority has held, the Commission is unable to grant any meaningful remedy in this case, the "safeguards" mentioned during the debate

over the GPTWI are non-existent. I am troubled by the fact that employees who raise concerns about promotions are quickly bogged down in procedural challenges and legal maneuvering before a hearing examiner can hear a single sentence of testimony. The Commission cannot faithfully execute its constitutional mandate if it takes over a year for a promotional challenge to clear procedural hurdles thrown up by appointing authorities. The intent of the review process was to create a streamlined alternative to drawn out litigation. Instead, the Commission must sift through hundreds of pages of transcript along with exhibits that are thicker than phone books. I would have expected any appointing authority to be in a position to defend its promotional decisions with concise reasons based upon merit. The employees and residents of New Orleans deserve as much. That is why I believe the 2016 Fire Captain promotions represent a failed experiment. I would encourage my fellow Commissioners to revisit the GPTWI amendments and restore protections against favoritism and political patronage the current system is powerless to prevent.

I also believe that the burden-shifting approach adopted by the majority places too much of the burden on the classified employee to defend a merit-based employment system. That is the role this Commission must and should play. The record clearly established that NOFD was unable to defend its promotional decisions as merit-based. The prior system based upon examination scores was not perfect, but at least employees and applicants knew the reason why someone else was promoted over other individuals.

Many of the amendments in the GPTWI were approved in the interest of giving appointing authorities more "flexibility" without acknowledging the substantial flexibility they already had. Even now, appointing authorities have a year to determine whether or not an employee is the proverbial "good fit" mentioned again and again by advocates for the rule changes. It strikes me as odd how often Parties on both sides of the dispute miss the working test period aspect of civil

service. NOFD, like any other appointing authority, has **one year** during which it can demote a promoted employee for any reason or no reason. This may result in some difficult conversations and decisions, but is a far better alternative than alienating a large swath of public employees highly distrustful of the existing promotional process.

None of us are omnipotent and even the most seasoned HR professional makes hiring mistakes. In writing this dissent, I am not arguing that NOFD, or any other department, should be saddled with a bad hire or promotion. There are mechanisms in place that allows an appointing authority to remove, discipline or demote employees who do not meet standards. These include evaluations, counseling sessions, working test periods and disciplinary actions. Some of these mechanisms require appointing authorities to do some work. But, I do not believe that it is too much to ask that appointing authorities put some effort into decisions that impact employees' lives and careers.

CLIFTON MOORE

5/2/18
DATE

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

STEVEN ACHORD, ET AL., vs. DEPARTMENT OF FIRE	DOCKET Nos.: 8610, 8642, 8614, 8613, 8609, 8641, 8615, 8648, 8616, 8646, 8643, 8617, 8602, 8618, 8603, 8619, 8620, 8621, 8606, 8622, 8608, 8640, 8612, 8623, 8611, 8624, 8625, 8626, 8605, 8627, 8628, 8593, 8607, 8630, 8631, 8632, 8633, 8634, 8635, 8636, 8637, 8638, 8639, 8647, 8604, 8655

COMMISSIONER TETLOW CONCURS IN THE RESULT AND ASSIGNS REASONS

With the exception of the conclusions articulated in section III.B, I join the majority of my colleagues in finding that the Fire Department failed to adequately explain the reasons for their promotional decisions during the hearing challenging those decisions. The burden-shifting analysis we establish makes clear that appointing authorities do not need to explain their decision-making in advance in great detail, but when a reasonable challenge is brought to whether that promotion was indeed merit-based (as required by the Louisiana Constitution) an appointing authority must establish that it was.

In this case, the Fire Department refused to provide any detail whatsoever about its decision-making process during the hearing, instead reciting only that it considered the fifteen factors that are listed in ADM-27. (Tr. v. 1 at 93:20-94:3). The Fire Department asks that we defer to its good judgment. The problem we find is that Civil Service Rule VI, Section 6.1, combined with the state constitutional requirement of merit-based decision making, must mean something more than utter deference.

The suggestions in the opinion about how an appointing authority might better support its process are simply that, suggestions. The broader legal point remains that if challenged, an appointing authority will need to have answers better than "trust us." We give examples of how they might do so to demonstrate that it can be done, but the fact remains that appointing authorities have great discretion on how best to make and justify merit-based promotions.

Where I disagree with a majority of my colleagues, and agree with Commissioner McClain, is about whether the Fire Department's criteria were themselves overly vague. There is an inherent tension between subjectivity and objectivity in hiring and promotional decisions. On the one hand, objective criteria such as testing help protect against bias and irrational decision-making. On the other hand, objective criteria will always struggle to measure certain crucial skills, particularly those necessary for good managers. Testing can never quite measure leadership skills or attributes like empathy, patience, or the ability to inspire one's colleagues to greater performance and create cultures of accountability. Just because those skills are difficult to measure does not render them any less crucial to the levels of performance that the citizens have a right to expect of their government.

I find the criteria used by the Fire Department to be entirely legitimate though they necessarily contain subjectivity. While it is true that the criteria lists "education" without specifying precisely what type of education, for example, I do not find it necessary for the Department to attempt to anticipate with some mathematical formula exactly what type of education might prove useful and to what degree. Rather, the point is that the Department needs to be able to articulate how that factor played out if challenged.

Tania Tetlow
TANIA TETLOW

5/21/18
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